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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

REBECCA FROST,

Plaintiff and Appellant,

v.

JOHN C. HARRIS, et al.,

Defendants and Respondents.

F069274

(Super. Ct. No. 13CECG00324)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Mark W. Snauffer, Judge.

Law Office of John K. Ormond and John K. Ormond for Plaintiff and Appellant.

Wanger Jones Helsley, Michael S. Helsley and Jena M. Graykowski, for
Defendants and Respondents.

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Plaintiff Rebecca Frost (Frost) appeals from the summary judgment entered in favor of defendants John C. Harris (Harris), Harris Farms, Inc. (Harris Farms), and Harris Ranch Inn & Restaurant (Harris Ranch) (collectively respondents) in Frost's action for sexual harassment, failure to investigate and retaliation in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.), and for slander.

We conclude the trial court did not err by granting respondents' motion for summary judgment because the acts of alleged harassment do not establish the existence of a hostile work environment, or slander, as a matter of law. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Harris is the owner of Harris Ranch, where Frost worked as a server for 20 years. During the last three or four years of her employment, if Harris ate in Harris Ranch's dining room and Frost was working, Frost would wait on Harris' table, which was located in station one of the restaurant. Harris or a manager would request that Frost wait on Harris's table; Frost liked working in station one because of the clientele. Frost worked Monday through Thursday. During the last year of her employment, Frost waited on Harris's table an average of two times per month.

One night in late 2011 or early 2012, Harris asked Frost why she was not waiting on his table. Frost responded that another waiter, Joaquin Juarez, would be handling his table as it was not part of her station that night. Harris told Frost he believed she could handle his table too; Frost responded that it was Juarez's table. Juarez approached Harris's table and said to Frost, "Becca, what are you doing trying to take over all my tables?" While Juarez joked with Frost, Harris joked that based upon the size of Frost's backside, she could handle another table. Juarez responded, "If that's what we're basing the things on, then maybe she can." Juarez's and Harris's joke was whether Frost could handle waitressing one more table that night. Everyone made light of the joke, but Frost found it offensive and degrading at the time.

Once within the last two years of her employment, Frost heard from two other servers that Harris made a comment regarding a slice of pie, stating that size doesn't matter. Frost was not offended by this comment. Sometime in 2011 or 2012, Harris approached Frost and a female coworker in the breezeway of the restaurant and said to them something to the effect of "you still look good" and "you still look sexy."

In September 2012, Frost was waiting on Harris's table. When Frost asked if they wanted a bottle of wine, Harris suggested she was offering a particular wine in order to get a bigger tip. Later that evening, Harris critiqued Frost on the way she had described the soup and menu items. After this incident, Frost told her manager that Harris had become "too familiar[,] " but nothing changed as a result.

In October 2012, while Frost was waiting on Harris's table, Harris and table guests Par Anderson and Desi Keck were joking around about their respective ages. Harris said to Frost that she was too old to be his daughter, but another server was not, and although Frost was no spring chicken, she still looked good. Frost was not offended by Harris's comment that she was no spring chicken, and felt what Harris said about her appearance was a compliment. Within the last year and a half before she quit, Harris made a similar comment to Frost and another waitress. During the October 2012 conversation, in response to a comment by another guest about her age, Frost joked back to the guest, "That's the pot calling the kettle black." Everyone was joking around during the conversation, including Frost.¹

On November 14, 2012,² while Frost was waiting on Harris's table, she suggested to him a particular bottle of wine called Trefethen, which had been the wine of the month,

¹ In her declaration opposing the motion, Frost stated that after Harris's comments in October 2012, she felt so uncomfortable about the incident and her relationship with Harris that she asked her manager to provide her with a "break" from being required to serve Harris whenever he came into the restaurant during one of her shifts, but she was never told she could avoid serving Harris, that she was not required to serve him, that an investigation had taken place, or the results of any investigation. Frost, however, testified in her deposition that the night after this incident, she told a manager about what happened and that she "really [did] need a break," as it was "too much." When asked by respondents' counsel what she meant by needing "a break," Frost responded that she "just needed a break from waiting on John all the time, that – or any of the VIPs. I needed a break[,] " by which she meant that she did not want to wait on them as much as she had been.

² Subsequent references to dates are to dates in 2012 unless otherwise noted.

and said: “John, we are still featuring Trefethen wine.” Harris asked, “What, are you screwing those guys?” Frost looked at Harris, said “Wow, that was horribly embarrassing,” and walked away. Frost understood that Harris thought the comment was a joke, but she did not take it that way. Harris’s two table guests, Parviz Kamangar and Dave Wood, did not hear any comment that was sexual in nature, offensive, or that made them believe Frost was having a sexual relationship with anyone at the winery. Frost knew Harris was aware she was married and that her husband had worked at Harris Farms in the mid-1990’s. In her 20 years of employment, this was the one and only time Harris ever made this type of comment to Frost.

After the comment, Frost spoke to server Pam Kline and then went to get a wine list. When she returned to Harris’s table, Harris asked Frost what she thought about another brand of wine and said, “How about this wine? It’s a good one don’t you think?” In response, Frost said, “Yeah, that’s a good one. Trefethen is better.” That night, Frost told her supervisor, Eric Saldana, what she heard Harris say to her. Saldana emailed Kirk Doyle, the General Manager of Harris Ranch, and Human Resources Manager Steven Warren, notifying them of Frost’s complaint. At the time of Harris’s comment, Frost was aware of an incident in March 2012 in which Harris physically assaulted Saldana in the restaurant in front of guests. To Frost’s knowledge, Harris suffered no discipline as a result of this incident and Frost was not told that anything had been done to see that such an incident was not repeated.³

³ Respondents filed written objections below to the admission of Frost’s evidence concerning the physical assault. In granting summary judgment, the trial court made a blanket decision overruling all evidentiary objections. On appeal, respondents argue this evidence should be excluded as irrelevant and because it lacks foundation. We do not decide the admissibility of the evidence, however, because even if admissible, the result is the same.

The next day, November 15, Warren had a 30-minute telephone conversation with Frost about what had occurred the previous day and asked questions about her complaint, including how she was and what she wanted to do; he also asked her to come into work and meet with him to discuss what happened. Frost responded that she needed a few days, but she would call and maybe come in, and she would let him know one way or the other. Warren told Frost she could come back to work and she did not have to serve Harris if she so chose. Warren told her she had options, such as moving to another station or department, or she could stay in the same station and not serve Harris when he ate at the restaurant, which during the past year had been about twice a month. Frost understood that Warren was trying to investigate her complaint.

On November 15, Warren sent Doyle his notes of his conversation with Frost. That same day, Doyle sent an email to Harris attaching Warren's notes and telling Harris that Frost was coming in on November 16 to make an official complaint. Harris responded on November 16 by emailing Doyle, Warren and Mike Casey, the Vice President of Risk Management and Human Resources of Harris Farms. Harris explained that he made the comment because he had concerns about wine vendors giving financial incentives to servers to push a given label. He claimed the words he used were "screwing around," which he did not think of as a sexual term but rather a term to describe entering into or negotiating a deal with the guys at the winery in order to get rewards from the winery.

On November 16, Warren called Frost; they discussed the incident and how she was doing. Warren asked Frost if there was any chance she may have misinterpreted what Harris had said. Warren again offered her options to return to work, and asked if she could come into the office to meet and discuss her complaint. Frost told Warren she would probably come in to talk to him, but she just needed more time. Warren never told Frost that she should drop her complaint or that she should not have brought a complaint against Harris. Frost never went to Harris Ranch to talk to Warren about her complaint

and, after November 14, had never been back to Harris Ranch. On November 16, Frost first contacted her attorney, John Ormond.

Since the investigation involved Harris, a corporate employee, Warren turned the investigation over to Casey on or about November 16. During Casey's investigation, he interviewed Saldana, Harris, Kline, Wood and Kamangar. When Casey interviewed Harris on or about November 17, Casey told Harris the comment Frost attributed to him. Harris denied saying those words. Instead, he said he asked Frost, "Are you screwing around with those guys at the winery?" Harris explained he asked the question because he was not happy that Frost was pushing a particular bottle of wine as opposed to letting the table decide what to choose. Harris also told Casey that he did not mean "screwing" in a sexual way, but meant it in the manner a person might say, "quit messing around" or "quit screwing around." When Casey interviewed the two men who were at Harris's table on the night in question, Wood and Kamangar, they told him they did not hear Harris ask if Frost was screwing the guys at the winery, but did recall hearing the phrase "screwing around with those guys."

On November 20, Casey received a letter from Ormond in which he stated that no one from Harris Ranch was to contact Frost, he was informed Warren had asked Frost to provide a statement concerning the event involving Harris, and it was unlikely she would ever provide a statement. On November 30, Casey met with Ormond to discuss Frost's complaint. Ormond told Casey he would send Casey a letter summarizing Frost's issues within seven to ten days. That day, Casey sent a letter to Ormond, in which he stated he would await the summary of issues and, pursuant to Ormond's request, Harris Ranch authorized a non-FMLA leave of absence for Frost pending receipt of an updated medical slip. Harris Ranch granted Frost's leave on December 3.

On December 10, Ormond mailed Harris a letter summarizing Frost's complaints regarding the November 14 event, and gave Harris Ranch until January 9, 2013, to respond. On December 17, Casey asked Ormond if he could interview Frost regarding

her complaint. The next day, Ormond asked Casey what the questions would be. Casey told Ormond he was welcome to attend the interview and direct Frost in answering questions, but he could not predict and provide an inclusive list of questions that might be asked during the course of an objective interview. On December 19, Ormond told Casey that Frost would not be produced for an interview. Casey then emailed Ormond and asked whether he could have Frost fill out an employee complaint form and return it to him, but the next day Ormond told Casey Frost would not do so. In late December 2012, Casey received a letter from Frost stating she was resigning from Harris Ranch based on the event that occurred on November 14, 2012.

On January 9, 2013, Casey sent Ormond a letter stating he had completed his investigation into the November 14 incident. Casey told Ormond his conclusions and offered Frost her position back with full seniority, stating that if Frost desired, they would make full accommodations for her, ensuring that she would not have to serve or speak to Harris in the future. Casey determined that no violation of company policy occurred under either Frost's or Harris's version of events, despite the fact that the policy provides that derogatory jokes concerning sexual matters are prohibited, with the knowledge, or constructive knowledge, that a woman such as Frost could reasonably interpret the remark, even under Harris's version, as being about sexual conduct. Casey did not consider Harris's relationship to Frost to be that of supervisor to employee, and did not consider it necessary to consult any professional or woman about the effect of Harris's comment on Frost, or any aspect of her claim.

According to Frost, Casey did not consider California law during his investigation and used his assertion that Frost was required to submit to a third interview as a pretext for denying her claim. At no time has anyone ever informed Frost that Harris had been admonished or disciplined for any reason, or that he could be controlled or any measures had been taken to change his attitudes or behaviors. Harris comes and goes in the restaurant as he chooses. As owner, he is not subject to discipline or controls by

executive management or the restaurant's general manager. Harris's name appears everywhere in the restaurant, such as on the doors, the front of the building, the menus and wine lists Frost was required to provide to customers, and his name was on Frost's paycheck.

Frost filed a complaint with the Department of Fair Employment and Housing (Department) and received a right-to-sue letter. Thereafter, she filed this lawsuit against respondents alleging causes of action for: (1) sexual harassment, retaliation and failure to investigate in violation the FEHA; (2) slander per se; (3) slander; and (4) intentional infliction of emotional distress.

The complaint alleges that from November 14, 2012 to January 2013, respondents engaged in a course of contact in violation of the FEHA. With respect to sexual harassment, the complaint alleges that on November 14 Harris "spoke the following false words in an accusatory manner and tone" about Frost, whom he knew to be a married woman, after she offered him and his guests a particular brand of wine: "So, what are you doing, screwing those guys at the winery"; that this statement imputed sexual misconduct, lack of chastity and dishonesty to Frost; and that respondents' conduct was unwelcome, intolerable and constituted sexual discrimination and harassment against Frost. With respect to failure to investigate, the complaint alleges that Frost complained of the harassment and discriminatory treatment, but respondents did nothing to correct, prevent or stop the conduct, or to ensure it would not be repeated, and instead, they attempted to coerce Frost to withdraw her complaint and failed to investigate the conduct. The retaliation claim is based on Frost's allegations that respondents: (1) failed to thoroughly investigate her discrimination complaint; (2) failed to investigate and take appropriate action when they knew or should have known of the discrimination and retaliation against her; and (3) failed to suspend, reprimand, discipline or discharge supervisors who either perpetrated, acquiesced in, ratified, or ignored obvious

discrimination and harassment against her. The slander claims are based solely on Harris's statement on November 14.

The trial court sustained respondents' demurrer to the fourth cause of action for intentional infliction of emotional distress and dismissed that claim, but overruled the demurrer as to the other causes of action.

Respondents subsequently filed their motion for summary judgment or, in the alternative, summary adjudication as to the remaining causes of action in the complaint. Respondents brought the motion on the following grounds: (1) the claim for sexual discrimination/hostile work environment sexual harassment fails because the alleged conduct was not severe or pervasive; (2) the claim for failure to investigate harassment is meritless as there was no harassment and, even if there were, respondents conducted a good faith investigation; (3) the retaliation claim fails because respondents investigated Frost's complaint and an employer's failure to investigate is not an adverse employment action; and (4) the slander claims fail because Harris's question was not interpreted, and could not reasonably be interpreted, as a statement of actual facts about Frost.

Frost filed a written opposition to the motion, in which she argued: (1) Harris's comment could be construed as severe enough to state a claim for sexual harassment under the FEHA; (2) there is an issue of fact as to whether the investigation into her claim was fraudulent, had a preconceived outcome, and was used to cause her emotional distress; (3) the evidence is susceptible to the inference that the investigation was conducted to carry out a plan to retaliate, as the evidence suggests Casey and Warren were not motivated to discover the truth or take corrective action; and (4) Harris's statement was slanderous because it had a tendency to injure Frost's reputation.

The trial court granted the motion as to the remaining causes of action. The trial court found that (1) the conduct was less severe and pervasive than in other cases where summary judgment was granted, and therefore there was no triable issue of fact that supported a finding of sexual harassment or hostile work environment; (2) an

investigation occurred despite Frost's refusal to attend an interview; (3) there was no retaliation and no indication respondents tried to coerce Frost into dropping her complaint; and (4) Harris's comment stemmed from his surprise or dismay at Frost presenting a particular bottle of wine and, in that context, the average person hearing the comment would not have taken it as an assertion of fact. In light of these findings, the trial court overruled all of the parties' proffered objections to the evidence.

DISCUSSION

Standard of Review

A defendant "may move for summary judgment ... if it is contended that the action has no merit." (Code Civ. Proc., § 437c, subd. (a).)⁴ The defendant bears the burden of showing that a cause of action has no merit because the plaintiff cannot establish an element of the claim or because the defendant has a complete defense. If the defendant makes this showing, the burden shifts to the plaintiff opposing the summary judgment motion to establish that a triable issue of fact exists as to these issues. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; § 437c, subds. (a), (p)(2).)

As the moving party, respondents "bear[] an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) If respondents meet this burden, then the burden of production shifts to Frost "to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Ibid.*)

On summary judgment or summary adjudication "the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the

⁴ Undesignated statutory references are to the Code of Civil Procedure.

trier of fact....” (*Aguilar, supra*, 25 Cal.4th at p. 856.) The court may, and in fact “must ... determine what any evidence or inference could show or imply to a reasonable trier of fact.” (*Ibid*, italics omitted.) To state this a bit differently, the court does not determine whether an opposing plaintiff’s evidence is credible, but rather determines what inference a reasonable trier of fact could draw from that evidence if the trier of fact were to believe that evidence. (See *Colarossi v. Coty U.S. Inc.* (2002) 97 Cal.App.4th 1142, 1153–1155 (*Colarossi*).)

We review an order granting summary judgment de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We independently review the record and apply the same rules and standards as the trial court. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) The trial court must grant the motion if “all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (§ 437c, subd. (c).) In ruling on a summary judgment motion, the court must “consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court.” (§ 437c, subd. (c); *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039 (*Hughes*); *Weil v. Federal Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 149, fn. 9.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar, supra*, 25 Cal.4th at pp. 850–851.) We view the facts in the light most favorable to the nonmoving party and assume that, for purposes of our analysis, her version of all disputed facts is correct. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 159 (*Sheffield*).)

Sexual Harassment

The trial court granted summary adjudication on Frost’s sexual harassment claim after finding the undisputed facts showed the alleged conduct was insufficient to

constitute severe or pervasive conditions. On appeal, Frost argues there are triable issues of material fact on this claim.

The FEHA prohibits an employer from harassing an employee on the basis of sex. (Gov. Code, § 12940, subd. (j).) Frost’s sexual harassment claim was based on a hostile work environment. To state a prima facie claim for hostile work environment sexual harassment, a plaintiff must establish that: (1) he or she was subjected to unwelcome sexual advances, conduct, or comments; (2) the harassment complained of was based on sex; and (3) the harassment was sufficiently severe or pervasive as to alter the conditions of his or her employment and create an abusive working environment. (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 279 (*Lyle*).)

Thus, “the hostile work environment form of sexual harassment is actionable only when the harassing behavior is *pervasive* or *severe*. . . . To prevail on a hostile work environment claim under California’s FEHA, an employee must show that the harassing conduct was ‘severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.’” (*Hughes, supra*, 46 Cal.4th at p. 1043, citation omitted.) To be actionable, “‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’” (*Lyle, supra*, 38 Cal.4th at p. 284.) “[C]onduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is unlawful, even if it does not cause psychological injury to the plaintiff.” (*Id.* at p. 283.)

“Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609.) “The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is

more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred.” (*Id.* at p. 610.) “[C]ourts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citations.] That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions.” (*Lyle, supra*, 38 Cal.4th at pp. 283–284.)

When the severity of harassment is at issue ““[t]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”” (*Lyle, supra*, 38 Cal.4th at p. 283.)

Our Supreme Court has observed that “an employee seeking to prove sexual harassment based on no more than a few isolated incidents of harassing conduct must show that the conduct was ‘severe in the extreme,’”; “[a] single harassing incident involving ‘physical violence or the threat thereof’ may qualify as being severe in the extreme.” (*Hughes, supra*, 46 Cal.4th at p. 1043.) “Generally . . . sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff.” (*Lyle, supra*, 38 Cal.4th at p. 284.)

“In the context of sex discrimination, prohibited harassment includes ‘verbal, physical, and visual harassment, as well as unwanted sexual advances.’” (*Lyle, supra*, 38 Cal.4th at p. 280.)

Frost contends she experienced sexual harassment that was both severe and pervasive. She asserts her work environment became hostile on November 14 when Harris made the “are you screwing those guys” remark. She argues this remark – when viewed in light of the facts that Harris owns Harris Ranch, the remark was made in public, and Harris could not be controlled and believed he was impervious to discipline – was sufficiently severe to support her hostile work environment claim. She contends an employer can be held liable when a business owner makes “a single egregious vulgar humiliating statement to an employee” in public where it is established that he is not controlled by the company’s policies. She asserts the issue should not be decided as a matter of law because a reasonable juror could conclude Harris’s remark was objectively offensive, i.e. humiliating and degrading, and made in circumstances that would cause a great degree of humiliation and interfere with her performance.

We disagree that the November 14 remark was so severe that it created an objectively hostile work environment. As respondents point out, since the alleged harassment was isolated and sporadic, Frost needs to show the harassment was “‘severe in the extreme[,]’” which generally includes either “‘physical violence or the threat thereof.’” (*Hughes, supra*, 46 Cal.4th at pp. 1043, 1049; *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 151 (*Herberg*).)

In *Hughes*, our Supreme Court held that the remark made by a male trustee to a female guardian in the presence of other people attending a private showing at a museum, “I’ll get you on your knees eventually. I’m going to fuck you one way or another[,]” while vulgar and highly offensive, was not severe in the extreme and therefore not actionable hostile environment harassment under Civil Code section 51.9, which prohibits sexual harassment in certain business relationships outside the workplace and

incorporates the liability limitations governing workplace sexual harassment suits. (*Hughes, supra*, 46 Cal.4th at p. 1049.) Noting that employment law acknowledges that an isolated incident of harassing conduct may qualify as severe if it consists of a physical assault or threat of one, the Court explained that, most reasonably construed, the remark was a threat of financial retaliation, not of physical violence, and therefore did not constitute severe harassing conduct. (*Id.* at p. 1049; see also *Herberg, supra*, 101 Cal.App.4th at pp. 151-152 [comparing cases in which harassment was found to be severe in the extreme, including forcible rape, being drugged and gang raped, and a noose being hung over an African-American employee's work station, and those where conduct was not severe, including a single incident in which a corrections officer used profane language and shook a female Hispanic officer by her collar, unwelcome sexual touching that does not involve violence or the threat of violence such as sexual horseplay, the defendant pressing the plaintiff against a door with his body twice in a five-minute period, and the plaintiff being rubbed and kissed on one occasion and resisting an attempted groping on another].)

The nature of the alleged harassment in this case does not begin to approach the severity of rape or violent sexual assault, or even milder forms of unwanted physical contact expressed in the case law. While vulgar and offensive, Harris's remark was an off-the-cuff comment that contained no threat of physical violence. Harris never touched Frost. We agree with respondents that Frost's allegations fall squarely into those cases wherein summary judgment is routinely granted.

Frost argues a lesser degree of severity will suffice to impose liability where the harasser is the owner of the business where the victim works, citing *E.E.O.C. v. Fairbrook Medical Clinic, P.A.* (4th Cir. 2010) 609 F.3d 320 (*Fairbrook*). In *Fairbrook*, the sole owner of the defendant medical clinic showed the victim, a doctor at the clinic, an x-ray that included a "shadowy," yet "highly visible" image of his penis, which he referred to as "Mr. Happy," and showed the image to other people in the clinic at least 25

to 30 times (*id.* at p. 323); used “sex-specific and derogatory terms” to refer to women at the clinic and spoke about female body parts, including his wife’s, in graphic terms (*id.* at p. 327); made several remarks involving “explicit or implicit proposals of sexual activity,” (*ibid.*); and asked the victim, who recently had a baby, whether “she had a better libido while she was pumping her breasts, opined that she was probably a ‘wild thing’ in bed, and requested to view and pump her breasts.” (*Ibid.*)

The appellate court reversed a grant of summary judgment in the employer’s favor, holding that this conduct “was not merely general crudity, but a series of graphic remarks of a highly personal nature directed at a female employee by the sole owner of the establishment.” (*Fairbrook, supra*, 609 F.3d at p. 322.) The court concluded there was a triable issue of fact on whether the conduct was sufficiently severe or pervasive to create a hostile work environment because it included highly personal remarks designed to demean and humiliate the plaintiff, as well as remarks that seemingly were intended to ridicule her in the eyes of patients and drug representatives. (*Id.* at pp. 328-329.) Moreover, a jury might conclude the environment at the clinic enhanced the severity of the harassment because, when evaluating the context in which harassment takes place, the court had often focused on the “‘disparity of power between the harasser and the victim.’” (*Id.* at p. 329.) Comparing the case to a prior one in which the court reasoned “the objective severity of the harassment was compounded by the fact the harasser was ‘an adult male in a supervisory position over young women barely half his age,’” the court reasoned that a jury could likewise conclude the severity of the owner’s conduct was exacerbated by the fact that he was not only the victim’s immediate supervisor, but also the sole owner of the clinic, and therefore had significant authority over her on a day-to-day basis and the ability to influence her career. (*Ibid.*)

As the court summarized, “the EEOC has produced evidence from which a reasonable jury could conclude that [the owner]’s conduct was severe or pervasive enough to create a hostile work environment. This evidence, if proven at trial, indicates

that [the owner], who was both [the victim]’s supervisor and the sole owner of the establishment, crossed the line from general crudity into actionable harassment by subjecting [the victim] to a series of sexually graphic and unmistakably personal remarks that made her work environment intensely uncomfortable.” (*Fairbrook, supra*, 609 F.3d at p. 331.)

In contrast here, although Harris owns Harris Ranch, he did not supervise Frost and there is no evidence, as Frost’s contends, that he had “complete control” over her work environment. Neither does the evidence show that Frost was “required” to serve Harris. While Harris’s ownership could factor into the determination of whether his conduct was sufficiently severe, this fact is not enough in this case to create a hostile work environment given the paucity of his comments that, while vulgar and offensive, did not include threats of physical violence and were not on par with those in which liability may be imposed.

For this reason, Frost’s reliance on *Quantock v. Shared Marketing Services, Inc.* (7th Cir. 2002) 312 F.3d 899, is misplaced. There, the president of the company propositioned a company account supervisor three times for sex during a business meeting between the two. (*Id.* at p. 902.) The appellate court determined that given the president’s repeated requests for sex made directly to the supervisor, and in light of his significant position of authority at the company and the close working quarters within which they worked, a reasonable jury could find the sexual propositions objectively sufficiently severe to alter the terms of the supervisor’s employment. (*Id.* at p. 904.) Here, however, Harris never demanded sex from Frost. Rather, this case involved a few sporadic comments over the course of two years, which do not amount to a hostile environment as a matter of law.

Frost asserts Harris’s remark was not a legitimate comment to make in a public setting. We agree. But a single vulgar, boorish, and offensive comment made in public is not enough. As such, this case is distinguishable from the one Frost cites, *Fuentes v.*

AutoZone, Inc. (2012) 200 Cal.App.4th 1221, in which the jury found a cashier at an auto parts store was subjected to a hostile environment sexual harassment where a store manager physically grabbed her hand and spun her around, telling her to display her buttocks to customers to increase sales, and the customers laughed and giggled in response; rumors were spread in the store that she had herpes; and there was profane speculation about a sexual relationship between her and a coworker. (*Id.* at pp. 1227-1231, 1234.) Unlike *Fuentes*, the few comments Harris made were not sexually charged, there was no physical touching involved, no rumors were spread, and the two table guests did not think anything sexual was implied by the comment.

Frost also contends severity is found in the human resources context of the event, as nothing was done when she previously complained about Harris's abusive conduct or after Harris physically assaulted her immediate supervisor, and therefore by November 14, it must be inferred that Frost was required to wait on Harris, that Harris was not going to be controlled by those responsible for carrying out the employee handbook's policies and promises, and Frost knew Harris could say whatever he wanted with impunity. That Harris may have believed he could get away with anything, and Frost believed this to be true, however, does not make Harris's remark on November 14 severe. Again, this is due to the fact that Harris's remark does not rise to the required level of severity as a matter of law.

Neither was the alleged harassment pervasive. At issue are six incidents that occurred over a two year period: (1) Harris's comment in late 2011 or early 2012 that, based on the size of Frost's backside, she could handle another table; (2) within the last two years, other servers told Frost that Harris commented about a slice of pie that size doesn't matter; (3) sometime in 2011 or 2012, Harris said to Frost and a female co-worker, "you still look good" and "you still look sexy"; (4) Harris critiqued Frost in September 2012 on the way she described the soup and menu items; (5) Harris told Frost in October 2012 that she was too old to be his daughter and though she was no spring

chicken, she still looked good; and (6) on November 14, when Frost offered a particular brand of wine, Harris remarked: “What, are you screwing those guys?”

Thus, the evidence shows that Harris made three isolated verbal comments to Frost about her appearance, one of which she did not find offensive and took as a compliment; one comment to other servers about a slice of pie that was conveyed to Frost and which she did not find offensive; one critique of Frost’s serving techniques that was not related to sex; and the November 14 remark. Although some of Harris’s comments were offensive, boorish, demeaning and humiliating, there was no actual or attempted physical touching, no sexual suggestions, no threats, no leering, no requests for sexual favors or for a date, and no sexual photos, emails or texts. The infrequent remarks occurred over the last two years of Frost’s 20 years of employment. Six remarks in two years is not constant harassment.

Considering the remarks in the context in which they occurred, a reasonable woman in Frost’s position would not find them sufficiently pervasive to alter the conditions of her employment at Harris Ranch. The remarks were few and none of them constituted an extreme incident sufficient to overcome their infrequency.

Courts have declined to find conduct more egregious than the remarks Frost was subjected to sufficient to support a sexual harassment claim. In *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, the Fourth Appellate District found three instances of harassment over five weeks to be insufficient for a hostile work environment claim, even though the conduct was more severe and involved two incidents of physical touching, including of the employee’s breast. Nevertheless, the “rude, inappropriate, and offensive behavior” was not enough to show that the workplace was permeated with “discriminatory intimidation, ridicule or insult” sufficiently pervasive to alter the conditions of the victim’s employment and constitute a hostile work environment. (*Id.* at p. 145; see *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 381–382, 386 (*Haberman*) [listing cases finding multiple harassing behaviors insufficient for

hostile work environment, and concluding that plaintiff's allegations of multiple inappropriate remarks did not establish severe or pervasive conduct].)

Frost argues the harassment became pervasive on November 14 because by then it was clear Harris was not going to be controlled. She admits that before November 14, Harris's banter could be seen as simple teasing, but contends that because he was not disciplined for assault and nothing was done about Frost's prior complaint, a reasonable juror could conclude Harris believed the rules did not apply to him, he would not be disciplined for his remarks to Frost, and the harassment would continue.

But the issue is not whether there is a future chance of pervasive harassment. Instead, for conduct or comments to be actionable under the hostile work environment theory of liability, the plaintiff must show "she was subjected to sexual advances, conduct, or comments that were *severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment.*" (*Lyle, supra*, 38 Cal.4th at p. 283.) As we have explained, the acts of harassment alleged against Harris fall far short of "establishing a pattern of continuous, pervasive harassment" [citation], necessary to show a hostile working environment under FEHA." (*Haberman, supra*, 180 Cal.App.4th at p. 382.)

In sum, the undisputed facts establish that the harassment to which Frost was subjected was neither pervasive or severe, and Frost failed to raise a triable issue of fact regarding hostile environment sexual harassment. We thus conclude that the trial court did not err in granting summary adjudication of this claim.

Failure to Investigate

Frost contends that she raised a triable issue of fact as to her claim for failure to investigate sexual harassment. An employer who knows or should have known of sexually harassing conduct and fails to take immediate and appropriate corrective action may be liable for the resulting damages, pursuant to Government Code section 12940, subdivision (j)(1). However, because the statute does not create a stand-alone tort, the

employee has no cause of action for a failure to investigate sexual harassment unless actionable sexual harassment occurred. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289.) As none occurred here, we conclude that the trial court did not err in granting respondents' motion for summary adjudication on Frost's failure to investigate claim.

Retaliation

Frost contends she was subjected to adverse employment actions for complaining that she was sexually harassed, which constitutes retaliation under the FEHA. "FEHA makes it unlawful for an employer or other person to 'discharge ... or otherwise discriminate against any person because the person has opposed any practices forbidden under this part.' (Gov. Code, § 12940, subd. (h).) A violation of this prohibition occurs when the employer takes harmful action against an employee in retaliation for the latter's engaging in a protected activity." (*McCaskey v. California State Auto Assn.* (2010) 189 Cal.App.4th 947, 987.)

To establish a prima facie case of unlawful retaliation, an employee must show that "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) In their motion, respondents sought to show that Frost would be unable to establish a prima facie case of unlawful retaliation, because the facts upon which she based her cause of action did not meet the accepted definition of an "adverse employment action."

"Adverse employment action" is a "shorthand expression referring to the kind, nature, or degree of adverse action against an employee that will support a cause of action" for retaliation. (*Yanowitz, supra*, 36 Cal.4th at p. 1049.) The appropriate standard for determining whether an employment action is sufficiently adverse is whether it "materially affects the terms, conditions, or privileges of employment." (*Id.* at p.

1051.) An action may materially affect the terms, conditions, or privileges of employment, even if it does not “impose an economic detriment or inflict a tangible psychological injury upon an employee.” (*Id.* at pp. 1052-1053 & fn. 11.) Minor or relatively trivial adverse actions that are reasonably likely to only anger or upset an employee cannot be viewed properly as materially affecting the terms, conditions, or privileges of employment and are not actionable. (*Id.* at pp. 1054-1055.)

To be actionable, retaliation must result in a substantial adverse change in the plaintiff’s terms and conditions of employment. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 (*Akers*).) “A change that is merely contrary to the employee’s interests or not to the employee’s liking is insufficient. Requiring an employee to prove a substantial adverse job effect ‘guards against both “judicial micromanagement of business practices,” [citation] and frivolous suits over insignificant slights.’ [Citation.] Absent this threshold showing, courts will be thrust into the role of personnel officers, becoming entangled in every conceivable form of employee job dissatisfaction. While the Legislature was understandably concerned with the chilling effect of employer retaliatory actions and mandated that FEHA provisions be interpreted broadly to prevent unlawful discrimination, it could not have intended to provide employees a remedy for any possible slight resulting from the filing of a discrimination complaint.” (*Akers, supra*, 95 Cal.App.4th at p. 1455.)

Here, Frost contends the adverse employment action to which she was subjected was the investigation into her harassment complaint, specifically that Warren and Casey asked her to come into the office, meet with them, and provide a formal complaint.⁵ She

⁵ Frost asserts the request to provide a formal complaint did not conform with the employee handbook’s complaint procedure. The handbook states that if an employee believes he or she is a victim of sexual harassment, the employee should promptly report the incident to an immediate supervisor or anyone in authority they feel comfortable approaching.

asserts it can reasonably be inferred from the manner in which the investigation was conducted that the human resources staff turned the investigative process into an inquisition about her, rather than an investigation of Harris.

Frost, however, provides no legal authority for the proposition that failure to adequately or properly investigate a harassment complaint qualifies as an adverse employment action. To the contrary, federal appellate courts have held, in retaliation claims under federal law, an employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint. (*Fincher v. Depository Trust and Clearing Corp.* (2nd Cir. 2010) 604 F.3d 712, 721 (*Fincher*); see also *Daniels v. United Parcel Service, Inc.* (10th Cir. 2012) 701 F.3d 620, 640-641; *Chuang v. University of California Davis, Bd. of Trustees* (9th Cir. 2000) 225 F.3d 1115, 1126 [failure to respond to employee's grievances does not amount to an adverse employment action].)⁶ This is because an employee whose complaint is not investigated has not suffered a punishment for bringing that same complaint; her situation is the same as it would have been had she not brought the complaint or had the complaint been investigated but denied for good reason or none at all. (*Fincher, supra*, 604 F.3d at p. 721.)

Similarly here, the manner in which respondents investigated Frost's complaint cannot constitute an adverse employment action because Frost's terms and conditions of employment were not affected. Accordingly, her retaliation claim is without merit.

Slander

The trial court dismissed Frost's slander claims on the ground Harris's statement – "What, are you screwing those guys?" – constituted non-actionable opinion. The

⁶ In light of the similarities between the FEHA and title VII of the federal Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.), California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment. (*Lyle, supra*, 38 Cal.4th at p. 278.)

statement was made in response to Frost telling Harris and his fellow diners that the restaurant was still featuring a particular brand of wine. Frost believed that Harris thought he was joking. The other diners did not take the statement literally, i.e. that Frost actually was having a sexual relationship with anyone at the winery.

Slander, a form of defamation (Civ. Code, § 44), is “a false and unprivileged publication, orally uttered,” (Civ. Code, § 46), which “[t]ends directly to injure [any person] in respect to his [or her] office, profession, trade or business, either by imputing to him [or her] general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his [or her] office, profession, trade, or business that has a natural tendency to lessen its profits[,]” or that imputes a “want of chastity.” (Civ. Code, § 46, subds. 3 & 4.) ““““The sine qua non of recovery for defamation ... is the existence of falsehood.”””” (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 426.)

Because a defamatory statement ““““must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability.”””” (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695 (*Summit Bank*)). The First Amendment protections of freedom of speech and press create a constitutional privilege that limits liability for defamation under state law for some, but not all, types of opinions. (See *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 14, 20 [full constitutional protection for statements of opinion on matters of public concern that do not contain or imply a provably false factual assertion]; *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600–601 [“courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse”].)

“Though mere opinions are generally not actionable [citation], a statement of opinion that implies a false assertion of fact is.” (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 289 (*Hawran*)). The “inquiry is not merely whether the statements

are fact or opinion, but “whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.”” (*Ibid.*; see *Summit Bank, supra*, 206 Cal.App.4th at p. 696 [“where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation”]; *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385 (*Franklin*) [“the question is not strictly whether the published statement is fact or opinion,” but “[r]ather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact”].)

The court looks at the totality of the circumstances “to determine both whether (a) a statement is fact or opinion, and (b) a statement declares or implies a provably false factual assertion; that is, courts look to the words of the statement itself and the context in which the statement was made.” (*Hawran, supra*, 209 Cal.App.4th at p. 289.) “This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.” (*Franklin, supra*, 116 Cal.App.4th at p. 389; see *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1147 (*Chaker*).)

“Whether a statement declares or implies a provably false assertion of fact is a question of law for the court to decide [citations], unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood.” (*Franklin, supra*, 116 Cal.App.4th at p. 385; see *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260; *Chaker, supra*, 209 Cal.App.4th p. 1147 [“critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law”]; *Summit Bank, supra*, 206 Cal.App.4th at p. 696 [“crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court”].) The principle that the “distinction between fact and opinion is a question of law . . . remains the rule if the statement unambiguously constitutes either fact or opinion. Where, . . .

however, the allegedly libelous remarks could have been understood by the average reader [in the target audience] in either sense, the issue must be left to the jury's determination." (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 682; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [if a statement is ambiguous, the question of law for the court is "whether [the] statement is reasonably susceptible to a defamatory interpretation"].) "The question is "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact...."" (*Summit Bank, supra*, at p. 696.)

Here, while Harris's comment was crude and impolite, there was nothing to suggest it was any more than a vulgar statement that could not reasonably be interpreted as stating actual facts about Frost. In looking at the totality of the circumstances, it was one quip Harris made at the dinner table in response to her suggesting a particular brand of wine. Harris was not stating that Frost actually was having sexual relations with "those guys" at the winery, and his dinner guests did not take it that way. Even Frost believed Harris meant it as a joke.

It is true that, as Frost points out, the proper inquiry is not whether the hearers of the statement thought it to be a joke or believed it to be true, but whether the communication reasonably could be understood in a defamatory sense by those who received it. (*Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 554 (*Polygram Records*).) But as the court in *Polygram Records* noted, considerations of the context in which the publication occurred and the nature of the audience's response "invariably will bear upon the determination whether a defamatory meaning could reasonably be attached to the communication in question." (*Ibid.*) Here, even apart from the belief of Frost and the diners, Harris's statement could not reasonably be interpreted as one of fact.

Frost contends Harris's statement, even if considered opinion, necessarily was based on undisclosed defamatory facts, namely that Harris knew Frost would offer that

brand of wine only if she had an ulterior motive which conflicted with her duty of loyalty to her employer and then “only if she was having satisfactory sexual relations with ‘those guys.’” She claims a reasonable juror could conclude Harris’s words carried with them the factual assertions that “[y]ou are not a loyal employee because you have offered that brand of wine and are ‘screwing those guys[,]’” and implies that she was an adulteress, promiscuous, and the kind of person who would breach a duty of loyalty by prostituting herself.

We disagree that Harris’s statement carries such connotations given the context in which it was made. The statement does not imply that Frost was in fact a disloyal employee who was “screwing those guys.” That Harris may have made the comment in an accusatory tone and manner, as Frost alleged in the complaint, does not change our analysis. While in that context the statement might not be seen as a joke, the average hearer of the comment still would not take it as a statement of fact.

In sum, Frost cannot meet the prima facie case of slander or slander per se, and the trial court did not err in granting summary adjudication on the slander claims.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

Gomes, J.

WE CONCUR

Hill, P.J.

Kane, J.